

103^D CONGRESS
2^D SESSION

S. 2506

Entitled “Wetlands Regulatory Reform Act of 1995”.

IN THE SENATE OF THE UNITED STATES

OCTOBER 5 (legislative day, SEPTEMBER 12), 1994

Mr. JOHNSTON introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

Entitled “Wetlands Regulatory Reform Act of 1995”.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Wetlands Regulatory
5 Reform Act of 1995”.

6 **SEC. 2. FINDINGS AND DECLARATION OF POLICIES AND**
7 **GOALS.**

8 (a) FINDINGS.—The Congress finds that—

9 (1) wetlands served important ecological and
10 natural resource functions, such as providing essen-
11 tial nesting and feeding habitat for waterfowl, other
12 wildlife, and many rare and endangered species, fish-

1 eries habitat, the enhancement of water quality, and
2 natural flood control;

3 (2) much of the Nation's resource has sustained
4 significant degradation, resulting in the need for ef-
5 fective programs to limit the loss of ecologically sig-
6 nificant wetlands and to provide for long-term res-
7 toration and enhancement of the wetlands resource
8 base; and

9 (3) because 75 percent of the Nation's wetlands
10 in the lower forty-eight States are privately owned
11 and because the majority of the Nation's population
12 lives in or near wetlands areas, an effective wetlands
13 conservation and management program must reflect
14 a balanced approach that conserves and enhances
15 ecologically significant wetlands functions while re-
16 specting private property rights, recognizing the
17 need for essential public infrastructure, such as
18 highways, utilities, ports, airports, sewer system, and
19 public water supply systems, and the need to pre-
20 serve strong local tax bases, and providing the op-
21 portunity for sustained economic growth.

22 (b) DECLARATION OF POLICIES AND GOALS.—Sec-
23 tion 101(a) (33 U.S.C. 1251(a)) is amended—

24 (1) by striking “and” at the end of paragraph
25 (6);

1 (2) by striking the period at the end of para-
2 graph (7) and inserting a semicolon; and

3 (3) by adding at the end the following:

4 “(8) it is the national policy that the Federal
5 wetlands permitting program under section 404 of
6 the Federal Water Pollution Control Act shall be im-
7 plemented to protect ecologically significant wetlands
8 while avoiding the diminishment of the use and
9 value of privately-owned property.”.

10 **SEC. 3. BALANCED IMPLEMENTATION OF PROGRAM TO**
11 **CONSERVE WETLANDS WHILE PROTECTING**
12 **PRIVATE PROPERTY RIGHTS.**

13 Section 404 (33 U.S.C. 1344) is amended by adding
14 at the end the following new subsection:

15 “(u) BALANCED IMPLEMENTATION.—

16 “(1) In implementing their responsibilities
17 under the regulatory program under this section, the
18 Secretary and the Administrator shall balance the
19 objective of conserving functioning wetlands with the
20 objective of ensuring continued economic growth,
21 providing essential infrastructure, maintaining
22 strong State and local tax bases, and protecting
23 against the diminishment of the use and value of
24 privately-owned property.

1 “(2) In carrying out this section, the Secretary
2 and the Administrator and all other Federal agen-
3 cies and officials of the Federal Government shall
4 seek in all actions to minimize the adverse effects of
5 the regulatory program under this section on the use
6 and value of privately-owned property.”.

7 **SEC. 4. DEFINITION AND DELINEATION OF WETLANDS.**

8 (a) Section 404 is amended by adding at the end the
9 following new subsection:

10 “(v) DEFINITIONS.—For purposes of this section, the
11 term—

12 “(1) ‘wetlands’ means those areas that are in-
13 undated or saturated by surface or groundwater at
14 a frequency and duration sufficient to support, and
15 that under normal circumstances do support, a prev-
16 alence of vegetation typically adapted for life in
17 saturated soil conditions. Wetlands generally include
18 swamps, marshes, bogs, fens, potholes, playa lakes,
19 vernal pools, and similar areas;

20 “(2) ‘Secretary’ means the Secretary of the
21 Army, acting through the Chief of Engineers; and

22 “(3) ‘Administrator’ means the Administrator
23 of the Environmental Protection Agency.”.

24 (b) Section 404(a) (33 U.S.C. 1344(a)) is amended—

25 (1) by inserting “(1)” after “(b)”;

1 (2) by redesignating paragraphs (1) and (2) as
2 subparagraphs (A) and (B);

3 (3) by striking “clause (1)” and inserting in
4 lieu thereof “subparagraph (A)”; and

5 (4) by adding at the end the following new
6 paragraphs:

7 “(2) REVISIONS TO DELINEATION PROCE-
8 DURES.—

9 “(A) IN GENERAL.—After the date of en-
10 actment of this Act, no revisions to or clarifica-
11 tions of the guidelines for identifying and delin-
12 eating wetlands areas under this subsection
13 shall be issued until the National Academy of
14 Sciences has completed the study of wetlands
15 authorized by the Department of Veterans Af-
16 fairs and Housing and Urban Development, and
17 Independent Agencies Appropriations Act, 1993
18 (Public Law 102–389).

19 “(B) REVISIONS.—Within 18 months of
20 the completion of the study required under sub-
21 paragraph (A), the Administrator shall review
22 the results of the study and, in consultation
23 with the Secretary, the Secretary of Agri-
24 culture, the Secretary of the Interior, and the
25 States, revise the guidelines referenced in sub-

1 paragraph (A) in accordance with subparagraph
2 (E), and as is otherwise necessary.

3 “(C) PROMULGATION OF REGULATIONS.—
4 Revision of the guidelines referenced in sub-
5 paragraph (A), along with those portions of the
6 guidelines that the Administrator does not pro-
7 pose to revise, shall, after public notice and op-
8 portunity for comment, be issued (in accordance
9 with section 553 of title 5 of the United States
10 Code and as otherwise required under this sec-
11 tion) as final rules and regulations. In carrying
12 out the provisions of this subparagraph, public
13 hearings shall be held in geographic areas of
14 the Nation that contain significant areas of
15 wetlands.

16 “(D) Notwithstanding subparagraph (C),
17 regulations adopted pursuant to this paragraph
18 shall be submitted to the relevant authorizing
19 committees of the House of Representatives and
20 the Senate and shall not become effective until
21 the 181st day after such submission.

22 “(E) The regulations promulgated pursu-
23 ant to this paragraph shall provide that, except
24 in the limited instances identified in the Corps
25 of Engineers Wetlands Delineation Manual is-

1 sued in January 1987 (Technical Report Y-87-
2 1) and implementing guidelines, in order to
3 make a positive wetland delineation determina-
4 tion, clear evidence of wetlands hydrology,
5 hydrophytic vegetation, and hydric soil must be
6 found to be present during the period in which
7 the delineation is made.

8 “(3) CONTINUED USE OF 1987 MANUAL.—

9 “(A) IN GENERAL.—Until such regulations
10 are promulgated, the Secretary, acting through
11 the Chief of Engineers, shall use the Corps of
12 Engineers Wetlands Delineation Manual issued
13 in January 1987 (Technical Report Y-87-1)
14 and implementing guidelines to identify and de-
15 lineate wetlands areas.

16 “(4) AGRICULTURAL LANDS.—

17 “(A) IN GENERAL.—For purposes of this
18 section, wetlands located on agricultural lands
19 and associated non-agricultural lands shall be
20 delineated by the Secretary of Agriculture in
21 accordance with section 1222(j) of the Food Se-
22 curity Act of 1985 (16 U.S.C. 3822(j)).

23 “(B) CONSISTENCY.—Any area of agricul-
24 tural land or any activities related to the land
25 determined to be exempt from the requirements

1 of subtitle C of title XII of the Food Security
2 Act of 1985 (16 U.S.C. 3821 et seq.) shall also
3 be exempt from the requirements of this section
4 for such period of time as those lands are used
5 as agricultural lands.

6 “(C) DEFINITION.—For purposes of this
7 section, the term ‘agricultural lands’ means
8 cropland, pastureland, native pasture, range-
9 land, orchards, vineyards, nonindustrial forest
10 land, and any other land used to produce or
11 support the production of an annual or peren-
12 nial crop of a commodity, aquaculture product,
13 nursery product, or livestock.”

14 **SEC. 5. WETLANDS CLASSIFICATIONS.**

15 Section 404(d) (33 U.S.C. 1344(d)) is amended by
16 striking all therein and by inserting in lieu thereof the
17 following:

18 “(d) WETLANDS CLASSIFICATION.—(1) The Admin-
19 istrator, with the assistance of the Secretary, and in con-
20 sultation with the Secretary of the Department of Agri-
21 culture, the Secretary of the Department of the Interior,
22 and the States, shall undertake a project to classify wet-
23 lands in the United States. Such classification project
24 shall be completed not later than ten years after the date
25 of enactment of this Act. In undertaking such project, pri-

1 ority shall be given to requests for classification under
2 paragraph (4).

3 “(2) In conducting the project under this section, the
4 classification of wetlands shall be based upon the best rea-
5 sonably obtainable scientific information, including the re-
6 sults of the National Academy of Sciences study of wet-
7 lands authorized by the Departments of Veterans Affairs
8 and Housing and Urban Development, and Independent
9 Agencies Appropriations Act, 1993 (Public Law 102-
10 389). Wetlands shall be classified as either Class A, Class
11 B, or Class C, depending on their relative ecological sig-
12 nificance, taking into account regional variations in hy-
13 drology, soils, and vegetation, as follows—

14 “(A) Class A wetlands are those wetlands—

15 “(i) which serve critical wetlands functions,
16 including the provision of critical habitat for a
17 concentration of avian, aquatic, or wetland-de-
18 pendent wildlife;

19 “(ii) which consist of or may be a portion
20 of ten or more contiguous acres and have an
21 inlet or outlet for relief of water flow; except
22 that this requirement shall not operate to pre-
23 clude the classification as Class A wetlands
24 lands containing prairie pothole features, playa
25 lakes, or vernal pools if such lands otherwise

1 meet the requirements for Class A classification
2 under this paragraph;

3 “(iii) for which there exists a scarcity of
4 functioning wetlands within the watershed or
5 aquatic ecosystem such that the discharge of
6 dredged or fill material into such wetlands
7 would seriously jeopardize the availability of the
8 wetlands functions identified in clause (i); and

9 “(iv) for which there is no overriding pub-
10 lic interest in the use of such wetlands for pur-
11 poses other than those served by wetlands;

12 “(B) Class B wetlands are those wetlands that
13 provide habitat for a significant population of avian,
14 aquatic, or wetland-dependent wildlife, or provide
15 other significant wetlands functions, including sig-
16 nificant enhancement or protection of water quality,
17 or significant natural flood control; and

18 “(C) Class C wetlands are those wetlands
19 that—

20 “(i) serve marginal wetlands functions that
21 exist in such abundance that regulation of ac-
22 tivities in such wetlands is not necessary to con-
23 serve important wetlands functions;

24 “(ii) are within industrial complexes or
25 other intensely developed areas that do not

1 serve significant wetlands functions as a result
2 of such location; or

3 “(iii) are located behind legally constituted,
4 man-made structures or natural formations,
5 such as levees constructed and maintained to
6 permit the utilization of such lands for commer-
7 cial, industrial, or residential purposes consist-
8 ent with local land use planning requirements.

9 “(3) In conducting the classification project under
10 this section, there shall be a public hearing in each county,
11 parish, or borough of a State before completion of wet-
12 lands classification in such county, parish, or borough.
13 Promptly after completion of wetlands classification in a
14 county, parish, or borough, a map or maps indicating the
15 classification of such wetlands shall be made available to
16 the public in the building within the county, parish, or
17 borough that contains property records, and shall be filed
18 with such property records, and notice of same shall be
19 published in the Federal Register and in publications of
20 wide circulation in such county, parish, or borough.

21 “(4) Until the classification process has been com-
22 pleted with respect to wetlands within a particular county,
23 parish, or borough, any person seeking a classification of
24 such wetlands may file a request with the Secretary, iden-
25 tifying the site of the wetlands and requesting the Sec-

1 retary to determine the classification of such wetlands.
 2 The requestor shall provide such additional information as
 3 may be necessary for purposes of determining the classi-
 4 fication of such wetlands.

5 “(5) Within 90 days following receipt of a request
 6 for classification under paragraph (4), the Secretary shall
 7 notify the requestor of the classification of the wetlands
 8 that are the subject of such request and shall state in writ-
 9 ing the basis for such classification. The classification of
 10 the wetlands that are the subject of the request shall be
 11 determined by the Secretary in accordance with this sub-
 12 section and the regulations promulgated pursuant thereto.

13 “(6) Not later than 1 year after the date of enact-
 14 ment of this Act, the Administrator, with the assistance
 15 of the Secretary, shall issue regulations implementing this
 16 subsection. Until such regulations are issued, the Sec-
 17 retary shall classify wetlands in response to a request for
 18 classification under paragraph (4), or as part of the per-
 19 mitting process pursuant to subsection (a).”.

20 **SEC. 6. ACTIVITIES REGULATED.**

21 Section 404(a) (33 U.S.C. 1344(a)) is amended—

22 (1) by striking “(a) The Secretary” and insert-
 23 ing the following:

24 “(a) IN GENERAL.—

25 “(1) ISSUANCE OF PERMITS.—The Secretary”;

1 (2) by adding at the end the following new
2 paragraph:

3 “(2) For purposes of this section, the discharge
4 of dredged or fill material into waters of the United
5 States includes the draining, channelization, and ex-
6 cavation of wetlands.”.

7 **SEC. 7. PERMIT METHODOLOGY.**

8 Section 404(a) (33 U.S.C. 1344(a)) is further
9 amended by adding at the end the following new para-
10 graphs:

11 “(3)(A) The Secretary shall determine whether
12 to issue a permit for the discharge of dredged or fill
13 material into wetlands classified pursuant to sub-
14 section (d) as Class A wetlands based on a sequen-
15 tial analysis that seeks to—

16 “(i) avoid adverse effects on such wetlands,

17 “(ii) minimize such adverse effects that
18 cannot be avoided, and

19 “(iii) mitigate any adverse effects that can-
20 not be avoided and that remain after minimiza-
21 tion.

22 Any permit authorizing the discharge of dredged or
23 fill material in Class A wetlands may contain such
24 terms and conditions concerning mitigation that the

1 Secretary deems appropriate to prevent the unac-
2 ceptable loss or degradation of Class A wetlands.

3 “(B) The Secretary shall determine whether to
4 issue a permit to authorize discharges of dredged or
5 fill material in wetlands classified pursuant to sub-
6 section (d) as Class B wetlands pursuant to a public
7 interest review. Such public interest review shall bal-
8 ance the reasonably foreseeable benefits and det-
9 riments resulting from issuance of the permit, based
10 on such factors as economic growth, the need for
11 fish and wildlife habitat, water supply and conserva-
12 tion, water quality, infrastructure needs, energy
13 needs, mineral needs, food production, recreation,
14 and considerations of private property ownership.
15 The Secretary may condition such permit as nec-
16 essary to ensure that the watershed or aquatic eco-
17 system of which such wetlands are a part does not
18 suffer significant loss or degradation of wetlands
19 functions.

20 “(C) No permit from the Secretary shall be re-
21 quired with respect to the discharge of dredged or
22 fill material on wetlands classified pursuant to sub-
23 section (d) as Class C wetlands. A State may require
24 a permit with respect to discharges in Class C wet-
25 lands if such State deems it appropriate, along with

1 such terms and conditions as such State may im-
2 pose.”.

3 **SEC. 8. REQUIRE CONSULTATION BETWEEN EPA AND THE**
4 **CORPS; REPEAL AUTHORITY OF EPA TO VETO**
5 **CORPS PERMITTING DECISIONS.**

6 Section 404(c) (33 U.S.C. 1344(c)) is amended to
7 read as follows: “The Secretary shall consult with the Ad-
8 ministrator regarding whether the discharge of such mate-
9 rial at the specified disposal site would have an unaccept-
10 able adverse effect on municipal water supplies, shellfish
11 beds and fishery areas (including spawning and breeding
12 areas), wildlife, or recreational areas.”.

13 **SEC. 9. EXTENSIONS OF TIME AND THE CONSEQUENCES OF**
14 **FAILURE BY THE SECRETARY TO MAKE A DE-**
15 **CISION.**

16 Section 404(a) (33 U.S.C. 1334(a)) is further
17 amended—

18 (1) by adding at the end of paragraph (1) (as
19 so designated) the following new sentence: “The Sec-
20 retary shall request from the applicant any addi-
21 tional information to complete the application not
22 later than 60 days after the Secretary receives the
23 application.”; and

24 (2) by adding at the end the following new
25 paragraphs:

1 “(3) DATE OF DECISION BY SECRETARY.—
2 Execpt as provided in paragraph (4), the Secretary
3 shall make a decision with respect to an application
4 for a permit submitted under paragraph (1) not
5 later than 90 days after the completed application is
6 submitted.

7 “(4) EXTENSION.—The decision of the Sec-
8 retary with respect to an application for a permit
9 under paragraph (1) may be made after the date
10 specified in paragraph (3) only if—

11 “(A) with respect to issuance of the per-
12 mit, the Secretary is required under the Na-
13 tional Environmental Policy Act of 1969 (42
14 U.S.C. 4321 et seq.) to issue an environmental
15 impact statement, in which case the decision
16 shall be made not later than 30 days after the
17 date on which the requirements of such Act are
18 met;

19 “(B) the permit application involves an ac-
20 tivity that may affect any species that is listed
21 or proposed for listing or any critical habitat
22 that is designated or proposed for designation
23 under the Endangered Species Act of 1973 (16
24 U.S.C. 1531 et seq.), in which case the decision
25 shall be made not later than 30 days after the

1 date on which the requirements of such Act are
2 met, as determined by the Secretary of the In-
3 terior, or the Secretary of Commerce, whomever
4 is appropriate;

5 “(C) the Administrator, the Secretary of
6 Agriculture, the Secretary of the Interior, the
7 Secretary of Commerce, or the Secretary of
8 Transportation, the head of any other appro-
9 priate Federal agency, or the Governor of the
10 State in which the activity occurs requests that
11 the Secretary of the Army or the Secretary of
12 Agriculture, as the case may be, grant an ex-
13 tension beyond the date specified in paragraph
14 (3) and such Secretary grants such request in
15 writing, in which case the decision shall be
16 made not later than 150 days after the com-
17 plete application is submitted;

18 “(D) the Secretary and the applicant for
19 the permit determine that additional time is
20 needed to evaluate the application; or

21 “(E) the decision is precluded as a matter
22 of law or procedures required by law.

23 “(5) CONSEQUENCES OF FAILURE BY THE SEC-
24 RETARY TO MAKE A DECISION.—If the Secretary
25 fails to make a decision by the date specified in

1 paragraph (3) or (4), as the case may be, the permit
2 shall be deemed granted.”.

3 **SEC. 10. GENERAL PERMIT IMPROVEMENTS.**

4 Section 404(e) (33 U.S.C. 1344(e)) is amended—

5 (1) by adding after “minimal” in the first place
6 it appears, “or temporary”; and

7 (2) by adding at the end the following new
8 paragraphs:

9 “(3) STATE PROGRAMS.—Upon the request of a
10 State, regional, local, or Tribal governmental body
11 with an existing wetlands regulatory program, the
12 Secretary shall issue a general permit for such pro-
13 gram if the non-Federal regulatory program—

14 “(A) has jurisdiction over the activities
15 and water within the scope of the requested
16 general permit;

17 “(B) provides adequate safeguards to en-
18 sure that it will provide at least the same de-
19 gree of protection for the navigable waters as
20 the protection provided by this section;

21 “(C) provides at least the same oppor-
22 tunity for public review, comment, and hearings
23 as the opportunity provided by this section; and

24 “(D) provides an opportunity for the Sec-
25 retary, in cooperation with the Administrator,

1 the Secretary of the Interior (acting through
2 the Director of the United States Fish and
3 Wildlife Service), and the Secretary of Com-
4 merce (acting through the Administrator of the
5 National Oceanic and Atmospheric Administra-
6 tion) to conduct periodic reviews of permit deci-
7 sions made under the non-Federal program in
8 order to ensure that the requirements of this
9 subsection are met.

10 The provisions of this paragraph shall not apply to
11 general permits issued by the Secretary for linear
12 utility facilities, and such linear utility facilities shall
13 continue to be regulated by the Secretary.

14 “(4) CONSISTENCY WITH SWAMPBUSTER.—A
15 general permit may be issued for discharges of
16 dredged or fill material associated with activities
17 found by the Secretary of Agriculture, in consulta-
18 tion with the Secretary of the Interior acting
19 through the Director of the United States Fish and
20 Wildlife Service, to be exempted from the ineligibility
21 provisions of section 1221 of the Food Security Act
22 of 1985 (16 U.S.C. 3821) pursuant to subsections
23 (f) and (h) of section 1222 of such Act (16 U.S.C.
24 3822) if the general permit—

1 “(A) provides adequate safeguards to en-
2 sure that the activities exempted will have no
3 more than minimal individual and cumulative
4 impacts on the environment; and

5 “(B) includes provisions to provide an op-
6 portunity for the Secretary and the Adminis-
7 trator to conduct periodic reviews of permit de-
8 cisions made by the Secretary of Agriculture to
9 ensure that the terms and conditions of the
10 general permit and the requirements of this
11 subsection are met.

12 “(5) GRANTS FOR STATE, REGIONAL, LOCAL
13 AND TRIBAL PROGRAMS.—The Secretary and the
14 Administrator may make a grant to a State, Tribal,
15 regional, or local governmental body for the oper-
16 ation of a regulatory program with respect to which
17 a general permit has been issued pursuant to this
18 subsection. The aggregate amount of such grants
19 may not exceed the amount made available by ap-
20 propriations to the Secretary or the Administrator to
21 carry out this section with respect to State, Tribal,
22 regional, or local governmental bodies.”.

23 **SEC. 11. EXEMPT ACTIVITIES.**

24 (a) Paragraph (1) of section 404(f) (33 U.S.C.
25 1344(f)(1)) is amended to read as follows:

1 “(f)(1) EXEMPT ACTIVITIES.—Except as provided in
2 paragraph (2) of this subsection, the discharge of dredged
3 or fill material is exempted from regulation under this sec-
4 tion, section 301(a) and 402 of this Act (except for efflu-
5 ent standards or prohibitions under section 307) if it is—

6 “(A) from normal farming, silviculture, and
7 ranching activities, such as haying, grazing, plowing,
8 seeding, cultivating, minor drainage, harvesting for
9 production of food, fiber, and forest products, or up-
10 land soil and water conservation practices;

11 “(B) for the purpose of maintaining, including
12 emergency reconstruction of recently damaged parts,
13 of currently serviceable structures such as dikes,
14 dams, levees, groins, riprap, breakwaters, water con-
15 veyances, linear utility facilities, causeways, bridge
16 abutments or approaches, and transportation struc-
17 tures;

18 “(C) for the purpose of constructing or main-
19 taining farm or stock ponds or irrigation ditches, or
20 the maintenance of drainage ditches or spreading
21 areas for groundwater recharge;

22 “(D) for the purpose of constructing temporary
23 sedimentation basins on a construction site that does
24 not involve a discharge of fill material into navigable
25 waters;

1 “(E) for the purpose of constructing or main-
2 taining farm roads or forest roads, or temporary
3 roads for moving mining equipment, or access roads
4 for linear utility facilities, or access roads to, or
5 within, drinking water treatment plants, if the roads
6 are constructed and maintained, in accordance with
7 best management practices, to ensure that—

8 “(i) flow and circulation patterns and
9 chemical and biological characteristics of the
10 navigable waters are not impaired;

11 “(ii) the reach of the navigable waters is
12 not reduced; and

13 “(iii) any adverse effect on the aquatic en-
14 vironment will otherwise be minimized;

15 “(F) resulting from any activity with respect to
16 which a State has a program approved by the Ad-
17 ministrator under section 208(b)(4) that meets the
18 requirements of subparagraphs (B) and (C) of such
19 section;

20 “(G) undertaken in connection with a marsh
21 management and conservation program in a coastal
22 county, parish, or borough, where such program has
23 been approved by the Governor of the State or the
24 designee of the Governor;

1 “(H) into tightly sealed forms or cells where the
2 material will be used as a structural member for
3 standard pile supported structures, such as piers
4 and docks, and for linear projects such as bridges,
5 transmission and distribution line footings, and
6 walkways;

7 “(I) for the placement of pilings in waters of
8 the United States in circumstances involving linear
9 projects such as bridges, elevated walkways, or
10 powerline structures, or that involve structures such
11 as piers, boathouses, wharves, marinas, lighthouses
12 and individual houses built on stilts solely to reduce
13 the potential of flooding;

14 “(J) for the clearing of vegetation (i) within
15 rights-of-way associated with the development and
16 maintenance of linear utility projects, including elec-
17 tric power transmission and distribution lines, petro-
18 leum product and natural gas pipelines, and water
19 and sewer lines, or (ii) from reservoirs used pri-
20 marily for storage of drinking water where the con-
21 struction of the reservoirs was authorized pursuant
22 to this section, or where the construction of res-
23 ervoirs predates the requirement for the authoriza-
24 tion;

1 “(K) undertaken on farmed wetlands, except
2 that any change in use of such land for the purpose
3 of undertaking activities that are not exempt from
4 regulation under this subsection shall be subject to
5 the requirements of this section to the extent that
6 such farmed wetlands are ‘wetlands’ under sub-
7 section (d) of this section;

8 “(L) undertaken on lands or involve activities
9 within a State’s coastal zone which are excluded
10 from regulation under a State coastal zone manage-
11 ment program approved under the Coastal Zone
12 Management Act of 1972 (16 U.S.C. 1451, et seq.);

13 “(M) undertaken in incidentally-created wet-
14 lands that have exhibited wetlands functions for less
15 than 5 years;

16 “(N) part of expanding an ongoing farming op-
17 eration involving the water-dependent, obligate crop
18 *Vaccinium macrocarpin*, so long as such expansion
19 does not occur in Class A wetlands, does not result
20 of in the conversion of more than ten acres of wet-
21 lands per operator per year, and the converted wet-
22 lands (other than where dikes and other necessary
23 facilities are placed) remain as wetlands or other wa-
24 ters of the United States;

1 “(O) from aggregate or clay mining activities in
2 wetlands if such activities are conducted pursuant to
3 a State or Federal permit that requires (i) that rec-
4 lamation of such affected wetlands to be completed
5 within five years of the commencement of such ac-
6 tivities, and (ii) that such wetlands be reclaimed to
7 a condition capable of supporting wetlands functions
8 substantially equivalent to the functions supported
9 by such wetlands at the time of commencement of
10 such activities; or

11 “(P) for the purpose of preserving and enhanc-
12 ing aviation safety or undertaken in order to prevent
13 an airport hazard.”.

14 (b) EXEMPTED AREAS.—Section 404(f) is further
15 amended by adding at the end the following new para-
16 graph:

17 “(3) EXEMPTED AREAS.—For purposes of this
18 section, the following shall not be considered to be
19 navigable waters—

20 “(A) nontidal drainage and irrigation
21 ditches excavated in uplands;

22 “(B) artificially irrigated areas which
23 would revert to uplands if the irrigation ceased;

24 “(C) artificial lakes or ponds created by
25 excavating or diking uplands to collect and re-

tain water, and that are used primarily for stock watering, irrigation, agricultural settling ponds, fire control, cranberry growing, or rice growing;

“(D) artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking uplands to retain water for primarily aesthetic reasons;

“(E) waterfilled depressions created in uplands incidental to construction activity and pits excavated in uplands for the purpose of obtaining fill, sand, gravel, aggregates or minerals, unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of navigable waters;

“(F) artificial stormwater detention areas and artificial sewage treatment areas that are not modifications of navigable waters;

“(G) prior converted croplands; and

“(H) confined dredged material disposal areas constructed in uplands.”.

SEC. 12. STATE PROGRAMS.

(a) STANDARDS FOR STATE DELEGATION.—Subsection (h)(2) of section 404 (33 U.S.C. 1344(h)(2)) is

1 amended by adding the following at the end: “The Admin-
2 istrator shall approve a State program submitted under
3 subsection (g)(1) that is developed to meet the particular
4 needs and circumstances of such State, provided that the
5 level of wetlands protection provided by the State program
6 is substantially similar to the protection provided by this
7 section.”

8 (b) FEDERAL OVERSIGHT OF STATE PROGRAMS.—
9 Subsection (i) of section 404 (33 U.S.C. 1344(i)) is
10 amended by adding the following at the end: “Not later
11 than 5 years after the date of the approval of a State pro-
12 gram, and every 5 years thereafter, in order to ensure that
13 the requirements of this section are met, the Adminis-
14 trator, in cooperation with the Secretary and the Secretary
15 of the Interior (acting through the Director of the United
16 States Fish and Wildlife Service), shall conduct a periodic
17 review of permit decisions made by a State that carries
18 out a program that is approved by the Administrator
19 under subsection (h)(2). The Secretary and the Adminis-
20 trator may make a grant to a State for the operation of
21 a program that is approved by the Administrator pursuant
22 to subsection (h)(2). The aggregate amount of such grants
23 may not exceed the amount that is made available by ap-
24 propriations to the Secretary or the Administrator to carry
25 out this section with respect to State programs.”.

1 (c) The last four sentences of section 404(j) (33
2 U.S.C. 1344(j)) are hereby repealed.

3 **SEC. 13. MITIGATION BANKS.**

4 Section 404 (33 U.S.C. 1344) is amended by adding
5 at the end the following new subsection:

6 “(w) MITIGATION BANKS.—

7 “(1) ESTABLISHMENT.—

8 “(A) IN GENERAL.—Not later than 1 year
9 after the date of enactment of this subsection,
10 after providing notice and opportunity for pub-
11 lic review and comment, the Secretary shall
12 issue regulations for the establishment, use,
13 maintenance, and oversight of mitigation banks.
14 The regulations shall be developed in consulta-
15 tion with the Administrator and the Secretary
16 of the Interior, acting through the Director of
17 the United States Fish and Wildlife Service.

18 “(B) PROVISIONS AND REQUIREMENTS.—

19 The regulations issued pursuant to subpara-
20 graph (A) shall ensure that mitigation banks—

21 “(i) comply with the guidelines estab-
22 lished under subsection (b)(1);

23 “(ii) to the extent practicable and en-
24 vironmentally desirable, provide in-kind re-
25 placement of lost wetlands functions, and

1 be located in, or in proximity to, the same
2 watershed as the affected wetlands;

3 “(iii) be operated by an entity which
4 has the financial capability to meet the re-
5 quirements of this section, including the
6 deposit of a performance bond or other ap-
7 propriate demonstration of financial re-
8 sponsibility to support the long-term main-
9 tenance of the bank, specify responsibilities
10 for long-term monitoring, maintenance,
11 and protection, and provide for the long-
12 term security of ownership interests of
13 wetlands and uplands on which projects
14 are conducted to protect the wetlands func-
15 tions associated with the mitigation banks;

16 “(iv) employ consistent and scientif-
17 ically sound methods to determine debits
18 by evaluating wetlands functions, project
19 impacts, and duration of the impact at the
20 sites of proposed permits for discharges of
21 dredged or fill material pursuant to this
22 section, and to determine credits based on
23 wetlands functions at the sites of mitiga-
24 tion banks;

1 “(v) provide for the transfer of credits
2 for mitigation that has been performed and
3 for mitigation that shall be performed
4 within a designated time in the future,
5 provided that financial bonds shall be post-
6 ed in sufficient amount to ensure that the
7 mitigation will be performed in the case of
8 default; and

9 “(vi) provide opportunity for public
10 notice of, and comment on, proposals for
11 mitigation banks: *Provided*, That the proc-
12 ess utilized by a mitigation bank to obtain
13 a permit under this section satisfies the re-
14 quirement for such public notice and com-
15 ment.

16 “(2) MITIGATION BANK DEFINED.—As used in
17 this section, the term ‘mitigation bank’ means a wet-
18 lands restoration, creation, enhancement, or preser-
19 vation project undertaken by one or more parties, in-
20 cluding private and public entities, expressly for the
21 purpose of providing mitigation compensation credits
22 to offset wetlands losses authorized by the terms of
23 permits allowing discharges of dredged or fill mate-
24 rial into the navigable waters.”.

1 **SEC. 14. ADMINISTRATIVE APPEALS PROCESS.**

2 Section 404 (33 U.S.C. 1344) is amended by adding
3 at the end the following new subsection:

4 “(x) ADMINISTRATIVE APPEALS.—

5 “(1) IN GENERAL.—Not later than 1 year after
6 the date of enactment of this subsection, the Sec-
7 retary shall, after providing notice and opportunity
8 for public comment, issue regulations establishing
9 procedures pursuant to which—

10 “(A) a landowner may appeal a determina-
11 tion of regulatory jurisdiction under this section
12 with respect to a parcel of property;

13 “(B) any person may appeal a determina-
14 tion that the proposed activity is not exempt
15 under subsection (f);

16 “(C) a landowner may appeal a determina-
17 tion that an activity is not regulated under a
18 general permit issued under this section;

19 “(D) an applicant for a permit under this
20 section may appeal a determination made pur-
21 suant to this section to deny issuance of the
22 permit or to impose a requirement under the
23 permit; and

24 “(E) a landowner or any other person re-
25 quired to restore or otherwise alter a parcel of

1 property pursuant to an order issued under this
2 section may appeal such order.

3 “(2) FILING DEADLINE.—An appeal brought
4 pursuant to this subsection shall be filed not later
5 than 30 days after the date on which written notice
6 of the decision or action that is the subject of the
7 appeal is received, or is deemed received, by the
8 party filing the appeal.

9 “(3) DECISION DEADLINE.—An appeal brought
10 pursuant to this subsection shall be decided not later
11 than 90 days after the date on which the appeal is
12 filed.

13 “(4) THIRD-PARTY COMMENTS ON APPEAL.—
14 Any person who participated in the public comment
15 process concerning a decision or action that is the
16 subject of an appeal brought pursuant to this sub-
17 section may file written comments with respect to
18 such appeal.

19 “(5) OFFICIAL DECIDING APPEAL.—An appeal
20 brought pursuant to this subsection shall be heard
21 and decided by an appropriate and impartial official
22 of the Federal Government, other than the official
23 who made the determination or carried out the ac-
24 tion that is the subject of the appeal.

1 “(6) PAYMENT OR MITIGATION AFTER AP-
 2 PEAL.—A landowner or any other person who has
 3 filed an appeal under this subsection shall not be re-
 4 quired to pay a penalty or perform mitigation or res-
 5 toration assessed under this section or section 309
 6 until after the appeal has been decided.”.

7 **SEC. 15. MAPPING AND PUBLIC NOTICE REQUIREMENTS.**

8 Section 404 is amended by adding at the end the fol-
 9 lowing new subsection:

10 “(y) MAPPING AND PUBLIC NOTICE REQUIRE-
 11 MENTS.—

12 “(1) The Corps of Engineers shall, within 90
 13 days after the enactment of this Act, provide the
 14 court of each county, parish, or borough in which
 15 Federal jurisdictional wetlands may be located, a no-
 16 tice for posting near the property records of the
 17 county, parish, or borough. Such notice shall: (i)
 18 state that Federal jurisdictional wetlands may be lo-
 19 cated in the county, parish, or borough, (ii) provide
 20 an understandable explanation of how Federal juris-
 21 diction over wetlands is determined, (iii) describe the
 22 requirements and restrictions of the wetlands regu-
 23 latory program under this section, and (iv) provide
 24 instructions on how to obtain a delineation and clas-
 25 sification of wetlands.

1 “(2) When the delineation or classification of a
2 property pursuant to this section becomes final, the
3 Secretary shall file a copy of the delineation, includ-
4 ing the classification of the wetland if any are
5 present, with the records of the property in the local
6 courthouse, and the Secretary shall serve a copy of
7 the delineation determination on every property
8 owner of record and any person with a recorded
9 mortgage or lien on the property.

10 “(3) The corps and the EPA shall file notice of
11 enforcement actions taken with respect to private
12 property in the property records of such property.

13 “(4) As the National Biological Survey com-
14 pletes the National Wetlands Inventory, the maps
15 prepared in that inventory shall be provided to the
16 court for posting in the counties, parishes, and bor-
17 oughs that are covered by the maps.”.

18 **SEC. 16. REGULATORY PROGRAM FOR ALASKA.**

19 (a) Section 404(b) (33 U.S.C. 1344(b)), as amended,
20 is further amended by adding at the end the following new
21 paragraph:

22 “(5) For permits for the discharge of dredged
23 or fill material within the State of Alaska, the guide-
24 lines issued under this subsection—

1 “(A) shall not include requirements or
 2 standards for compensatory mitigation of ad-
 3 verse impacts, but may include requirements for
 4 non-compensatory mitigation of adverse im-
 5 pacts,

6 “(B) shall include requirements or stand-
 7 ards for minimization of impacts, and

8 “(C) may include standards or require-
 9 ments for avoidance of impacts, except that the
 10 permit applicant shall not be required to estab-
 11 lish that upland alternative sites do not exist.”.

12 (b) STANDARDS FOR GENERAL PERMITS IN ALAS-
 13 KA.—Section 404(e) (33 U.S.C. 1344(e)), as amended by
 14 section 10, is further amended by inserting the following
 15 new paragraph after paragraph (5):

16 “(6) Notwithstanding the requirements of para-
 17 graphs (1) and (2), the Secretary shall issue a gen-
 18 eral permit for discharges of dredged and fill mate-
 19 rial in Alaska. Such general permit shall contain re-
 20 quirements that provide a similar degree of protec-
 21 tion for navigable waters as the protection required
 22 by the other provisions of subsection (b)(5).”.

23 (c) Section 404 (33 U.S.C. 1344) is amended by add-
 24 ing at the end thereof:

25 “(z) ALASKA NATIVE CORPORATION LANDS.—

1 “(1) IN GENERAL.—Lands conveyed to, selected
2 by, or owned by Alaska Native Corporations pursu-
3 ant to the Alaska Native Claims Settlement Act,
4 Public Law 92–203, as amended, shall be ‘economic
5 base lands’.”

6 “(2) PERMIT CONSIDERATIONS.—Regarding
7 permit decisions for economic base lands, in addition
8 to the requirements in subsection (a) and (b), the
9 Secretary shall—

10 “(A) balance the standards and policies of
11 this Act against the obligations of the United
12 States to allow economic base lands to be used
13 beneficially to create and sustain economic ac-
14 tivity;

15 “(B) give substantial weight to the social
16 and economic needs of Alaska Natives; and

17 “(C) account for regional differences,
18 abundance, and functions of wetlands.

19 “(3) GENERAL PERMITS.—Regarding rural
20 Alaska Native villages as defined in section 3(c) of
21 the Alaska Native Claims Settlement Act, Public
22 Law 92–203 (43 U.S.C. 1602(c)), the Secretary
23 shall issue general permits for disposition of dredge
24 and fill material for critical infrastructure, including
25 water and sewer systems, airports, roads, commu-

1 nication sites, fuel storage sites, landfills, housing,
2 hospitals, medical clinics, schools, and other commu-
3 nity infrastructure in rural Alaska villages without a
4 determination that activities authorized by such a
5 general permit cause only minimal adverse environ-
6 mental effects when performed separately and will
7 have only minimal cumulative adverse effects on the
8 environment.

9 “(4) OTHER CONSIDERATION.—The Secretary
10 shall consult with and provide assistance to Alaska
11 Native Corporations and the State of Alaska regard-
12 ing promulgation and administration of policies and
13 regulations under this section.”.

14 **SEC. 17. DEFINITIONS.**

15 Section 502 of the Federal Water Pollution Control
16 Act (33 U.S.C. 1362) is amended by adding at the end
17 thereof the following new paragraphs:

18 “(21) The term ‘wetlands’ means those areas
19 that are inundated or saturated by surface or
20 ground water at a frequency and duration sufficient
21 to support, and that under normal circumstances do
22 support, a prevalence of vegetation typically adapted
23 for life in saturated soil conditions. Wetlands gen-
24 erally include swamps, marshes, bogs, fens, potholes,
25 playa lakes, vernal pools, and similar areas.

1 “(22) The term ‘creation of wetlands’ means an
2 activity that brings a wetland into existence at a site
3 where it did not formerly exist.

4 “(23) The term ‘enhancement of wetlands’
5 means any activity that increases the functioning of
6 existing wetlands.

7 “(24) The term ‘wetlands functions’ means the
8 roles wetlands serve, including flood water storage,
9 flood water conveyance, groundwater discharge, ero-
10 sion control, wave attenuation, water quality protec-
11 tion, scenic and aesthetic use, food chain support,
12 fisheries, wetlands plant habitat, aquatic habitat,
13 and habitat for wetland-dependent wildlife.

14 “(25) The term ‘incidentally created wetlands’
15 means lands that exhibit wetlands characteristics
16 sufficient to meet the criteria for delineation of wet-
17 lands, where one or more of such characteristics is
18 the unintended result of human induced alterations
19 of hydrology.

20 “(26) The term ‘maintenance,’ when referring
21 to wetlands, means activities undertaken to assure
22 continuation of a wetland or the accomplishment of
23 project goals after a restoration or creation project
24 has been completed, including water level manipula-
25 tions and control of non-native plant species.

1 “(27) The term ‘normal farming, silviculture,
2 aquaculture and ranching activities’ means normal
3 ongoing practices identified as such by the Secretary
4 of Agriculture, in consultation with the Cooperative
5 Extension Service for each State and the land grant
6 university system and agricultural colleges of the
7 State, taking into account existing practices and
8 such other practices as may be identified in con-
9 sultation with the affected industry or community.

10 “(28) The term ‘prior converted cropland’
11 means land that was both manipulated (drained or
12 otherwise physically altered to remove excess water
13 from the land) and cropped before December 23,
14 1985, to the extent that such land no longer exhibits
15 significant wetlands functions.

16 “(29) The term ‘restoration,’ when referring to
17 wetlands, means an activity undertaken to return a
18 wetland from a disturbed or altered condition with
19 lesser acreage or fewer functions to a previous condi-
20 tion with greater wetlands acreage or functions.

21 “(30) The term ‘temporary impact’ or ‘tem-
22 porary effect’ means the disturbance or alternation
23 of wetlands caused by activities under circumstances
24 in which, within three years following the commence-
25 ment of such activities, such wetlands—

1 “(A) are returned to the conditions in ex-
2 istence prior to the commencement of such ac-
3 tivity; or

4 “(B) display conditions sufficient to ensure
5 that without further human action, such wet-
6 lands will return to the conditions in existence
7 prior to the commencement of such activity.

8 “(31) The term ‘linear utility facility’ means a
9 continuous conveyance, such as a pipeline, cable,
10 line, or wire, used for the transmission, gathering, or
11 distribution of electric power, natural gas, oil, or
12 water.”.

○

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